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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE DISTRICT OF OREGON

10 JESSE ESPINOZA,

Civil No. 08-1410-AA
OPINION AND ORDER

11 Plaintiff,

12 vs.

13 MICHAEL J. ASTRUE,
Commissioner of Social Security,

14 Defendant.

15 _____
16 Alan Stuart Graf
17 Attorney At Law
18 P.O. Box 98
Summertown, Tennessee 38483
Attorney for plaintiff

19 Kent S. Robinson
20 Acting United States Attorney
District of Oregon
21 Adrian L. Brown
Assistant United States Attorney
1000 S.W. Third Avenue, Suite 600
Portland, Oregon 97204-2902

22 David J. Burdett
23 Special Assistant U.S. Attorney
24 Social Security Administration
701 Fifth Avenue, Suite 2900 M/S 901
Seattle, Washington 98104-7075
25 Attorneys for defendant

26 AIKEN, Judge:

27 Claimant, Jesse Espinoza, brings this action pursuant to
28 the Social Security Act (the Act), 42 U.S.C. §§ 405(g) and

1 1383(c)(3), to obtain judicial review of a final decision of the
2 Commissioner denying his application for disability insurance
3 benefits (DIB) under Title II of the Act and for Supplemental
4 Security Income (SSI) disability benefits under Title XVI of the
5 Act. For the reasons set forth below, the Commissioner's
6 decision is reversed and remanded, in part, for additional
7 administrative proceedings; and reversed and remanded for payment
8 of benefits.

9 **PROCEDURAL BACKGROUND**

10 On May 12, 2003, plaintiff applied for DIB and SSI. Tr.
11 16. Plaintiff has an alleged onset disability date of February
12 1, 2002. Id. Plaintiff's claims were denied initially and upon
13 reconsideration. He filed a timely request for a hearing. Id.
14 On January 9, 2007, a video hearing was held before
15 Administrative Law Judge (ALJ) Slocum. Tr. 24. On April 24,
16 2007, the ALJ issued an unfavorable decision. Id. Plaintiff
17 filed a timely request for appeal and on October 1, 2008, the
18 Appeals Council affirmed the ALJ's decision making that the final
19 decision of the Commissioner.

20 **STATEMENT OF THE FACTS**

21 Plaintiff alleges that his ability to work is limited by
22 stress, cervical disc disease, chronic pain and a lack of sleep.
23 Tr. 54. Due to plaintiff's sleep deprivation, stress and
24 medication side effects, he has problems focusing. Id.
25 Plaintiff indicates that he stopped working for the final time
26 due to problems with "passing out" and numbness on the left side
27 of his body. Id.

STANDARD OF REVIEW

This court must affirm the Secretary's decision if it is based on proper legal standards and the findings are supported by substantial evidence in the record. *Hammock v. Bowen*, 879 F.2d 498, 501 (9th Cir. 1989). Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (quoting *Consolidated Edison Co. v. N.L.R.B.*, 305 U.S. 197, 229 (1938)). The court must weigh "both the evidence that supports and detracts from the Secretary's conclusion." *Martinez v. Heckler*, 807 F.2d 771, 772 (9th Cir. 1986).

The initial burden of proof rests upon the claimant to establish disability. *Howard v. Heckler*, 782 F.2d 1484, 1486 (9th Cir. 1986). To meet this burden, plaintiff must demonstrate an "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected . . . to last for a continuous period of not less than 12 months. . . ." 42 U.S.C. § 423(d) (1) (A).

The Secretary has established a five-step sequential process for determining whether a person is disabled. *Bowen v. Yuckert*, 482 U.S. 137, 140 (1987); 20 C.F.R. §§ 404.1520, 416.920. First the Secretary determines whether a claimant is engaged in "substantial gainful activity." If so, the claimant is not disabled. *Yuckert*, 482 U.S. at 140; 20 C.F.R. §§ 404.1520(b), 416.920(b).

In step two the Secretary determines whether the claimant

1 has a "medically severe impairment or combination of
 2 impairments." Yuckert, 482 U.S. at 140-41; see 20 C.F.R.
 3 §§ 404.1520©, 416.920©. If not, the claimant is not disabled.

4 In step three the Secretary determines whether the
 5 impairment meets or equals "one of a number of listed impairments
 6 that the Secretary acknowledges are so severe as to preclude
 7 substantial gainful activity." Id.; see 20 C.F.R. §§
 8 404.1520(d), 416.920(d). If so, the claimant is conclusively
 9 presumed disabled; if not, the Secretary proceeds to step four.
 10 Yuckert, 482 U.S. at 141.

11 In step four the Secretary determines whether the claimant
 12 can still perform "past relevant work." 20 C.F.R. §§
 13 404.1520(e), 416.920(e). If the claimant can work, she is not
 14 disabled. If she cannot perform past relevant work, the burden
 15 shifts to the Secretary. In step five, the Secretary must
 16 establish that the claimant can perform other work. Yuckert, 482
 17 U.S. at 141-42; see 20 C.F.R. §§ 404.1520(e)-(g), 416.920(e)-(g).
 18 If the Secretary meets this burden and proves that the claimant
 19 is able to perform other work which exists in the national
 20 economy, she is not disabled. 20 C.F.R. §§ 404.1566, 416.966.

21 **DISCUSSION**

22 1. The ALJ's Findings

23 _____This case proceeded to step five of the sequential
 24 evaluation process, at which point the ALJ relied upon the
 25 medical vocational guidelines to find that plaintiff could adjust
 26 to work existing in significant numbers in the national economy.
 27 Tr. 23-24.

1 2. Plaintiff's Allegations of Error

2 The parties agree that the ALJ erred by: (1) relying on the
3 medical vocational grids; and (2) failing to give adequate
4 consideration to the opinions of Dr. Eikrem. The parties also
5 agree that remand for additional proceedings is appropriate for
6 the time period beginning February 1, 2002 (the alleged date of
7 onset) to January 5, 2004, consistent with the defendant's
8 admissions of error as stated above. As of January 6, 2004,
9 however, plaintiff argues that the record is complete and needs
10 no further development, and therefore the court should remand for
11 payment of benefits from that date to the present. Defendant
12 disagrees and argues that remand for additional proceedings is
13 appropriate for the entire time period at issue.

14 Plaintiff relies on Dr. Eikrem's "first definitive letter
15 of January 6, 2004" opining that plaintiff was unable to work due
16 to narcolepsy. Defendant argues that a vocational expert ("VE")
17 must be consulted regarding the vocational effect of the
18 limitations assessed by Dr. Eikrem before it can be said with
19 certainty that no jobs exist in significant numbers in the
20 national economy that plaintiff can perform. See Moore v. Apfel,
21 216 F.3d 864, 869 (9th Cir. 2000)("[w]hen the grids do not
22 completely describe the claimant's abilities and limitations,
23 such as when the claimant has both exertional and nonexertional
24 limitations [as here], the grids are inapplicable and the ALJ
25 must take the testimony of a VE.").

26 An award of benefits is appropriate only when no useful
27 purpose would be served by further administrative proceedings, or
28 when the record has been fully developed and there is not

1 sufficient evidence to support the ALJ's conclusion. Rodriguez
2 v. Bowen, 876 F.2d 759, 763 (9th Cir. 1989). That is exactly the
3 situation here. The record here indicates that plaintiff cannot
4 work due to his diagnosis of narcolepsy. On January 6, 2004,
5 plaintiff's treating physician, Dr. Eikrem, wrote: "All of these
6 questions do not address [plaintiff's] main problem, which is
7 narcolepsy. As far as I am concerned he cannot work at all until
8 he gets on top of this, as he can't stay awake." Tr. 224. On
9 August 18, 2004, Dr. Eikrem stated:

10 This patient was once again asked to do
11 job training, and I am supposed to fill out
12 a form saying that he may do this. The
13 problem is the patient has documented narcolepsy.
14 At first he was unable to take Provigil because
15 he could not afford it. When he finally got
16 some, it gave him intolerable side effects of
17 nocturnal tachycardia so he was unable to
18 stay on it. As a result, he is still falling
19 asleep and is unable to attend any sort of
20 training course until this problem has been
21 addressed more satisfactorily.
22 Therefore, I filled out his form saying he is
23 not a candidate for this[.]

24 Tr. 260.

25 On September 7, 2004, Dr. Eikrem reiterates plaintiff's
26 diagnosis of narcolepsy and states that "medications, so far
27 [are] not effective or tolerable." Tr. 243. Dr. Eikrem also
28 indicates that the condition is "permanent." Id. On November
11, 2004, Dr. Eikrem completed a Functional Limits Assessment
indicating that plaintiff was not able to participate in
classroom activities, job readiness classes, a job search, work
experience (30 hours per week of on-the-job work experience), or
work due to his narcolepsy. Tr. 246. Dr. Eikrem again indicated
the condition was "permanent." Id. Finally, on November 12,

1 2004, Dr. Eikrem states that: "this patient remains unemployable
2 and is going to remain unemployable unless he can get some help
3 with [his narcolepsy]. I am out of ideas, so I would like him to
4 go back to the Sleep Center. Unfortunately, this patient may
5 fall through the cracks as Oregon Health Plan may not allow him
6 to do so. If so, I am pessimistic that he is ever going to be
7 able to return to meaningful employment." Id.

8 Finally, it is significant that the ALJ decided not to call
9 a vocational expert during the hearing. Tr. 349-50. The ALJ
10 stated: I want the record to show that when I reviewed this case
11 on December 28, 2006, I did request a vocational expert be
12 present. My clerk was unable to secure one. So we'll proceed
13 without a vocational expert today." Id.

14 A remand for benefits should occur when: "(1) the ALJ has
15 failed to provide legally sufficient reasons for rejecting such
16 evidence, (2) there are no outstanding issues that must be
17 resolved before a determination of disability can be made, and
18 (3) it is clear from the record that the ALJ would be required to
19 find the claimant disabled were such evidence credited." Smolen
20 v. Chater, 80 F.3d 1273, 1292 (9th Cir. 1996). I agree that from
21 the date of Dr. Eikrem's letter, January 6, 2004, where he finds
22 plaintiff unable to work due to narcolepsy, the record is
23 complete and needs no further development. Therefore, the ALJ's
24 decision is reversed and remanded for payment of benefits from
25 that date onward.

26 CONCLUSION

27 The defendant's motion to remand (doc. 19) is granted in
28 part and denied in part as follows: the Commissioner's decision

1 is reversed and remanded for additional administrative
2 proceedings as stated above (for the period February 1, 2002 to
3 January 5, 2004), and beginning January 6, 2004 to the present,
4 the Commissioner's decision is not based on substantial evidence,
5 and therefore, it is reversed and remanded for payment of
6 benefits.

7 IT IS SO ORDERED.

8 Dated this 14 day of December 2009.

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11
12 /s/ Ann Aiken

13 Ann Aiken
14 United States District Judge
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